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No. 06-1232

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In The Supreme Court of the United States

CSX TRANSPORTATION, INC. and RONALD PAUL BOWEN,

Petitioners,

v.

EARTHA MAE WILLIAMS, as Personal Representative of the Estate of Gregory Stanley Williams,

Respondent.

On Petition for Writ of Certiorari from the Supreme Court of South Carolina

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. CSXT DID NOT INVITE A RETRIAL LIMITED TO PUNITIVE DAMAGES WITHOUT THE PROCEDURAL SAFEGUARDS REQUIRED BY *STATE FARM* AND *PHILIP MORRIS*. (Reply to Argument I.) 2

II. WITH REGARD TO PUNITIVE DAMAGES, CSXT WAS TRIED IN AN UNCONSTITUTIONAL MANNER AND WILL BE RETRIED WITH A PROCEDURE THAT DOES NOT SATISFY *PHILIP MORRIS*. (Reply to Argument II.) 3

III. REVIEW OF SOUTH CAROLINA'S FAILURE TO EMPLOY THE REQUISITE PROCEDURAL SAFEGUARDS IS AVAILABLE PRIOR TO ANY ACTUAL AWARD OF PUNITIVE DAMAGES ON REMAND. (Reply to Argument III.) 4

IV. CSXT HAS PRESENTED AN ISSUE OF GENERAL IMPORTANCE AND ALSO AMPLE JUSTIFICATION FOR A GVR ORDER IN LIGHT OF *PHILIP MORRIS*. (Reply to Argument IV.) 5

V. THE SUPREME COURT OF SOUTH CAROLINA'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT. (Reply to Argument V.) 6

VI. THE RECORD CLEARLY DEMONSTRATES THAT THE TRIAL COURT ADMITTED EVIDENCE IN VIOLATION OF BOTH *STATE FARM* AND *PHILIP MORRIS*. (Reply to Argument VI.) 7

VII. SOUTH CAROLINA FAILED TO PROVIDE PROCEDURAL SAFEGUARDS REQUIRED BY THIS COURT'S JURISPRUDENCE. (Reply to Argument VII.).....7

VIII. IN THIS CONTEXT, CSXT CANNOT BE RETRIED ON PUNITIVE DAMAGES ALONE WITHIN THE PARAMETERS OF *STATE FARM* AND *PHILIP MORRIS*. (Reply to Argument VIII.).....8

IX. THE SOUTH CAROLINA SUPREME COURT CLEARLY APPLIED THE TWO ISSUE RULE. (Reply to Argument IX.).....9

CONCLUSION.....10

TABLE OF AUTHORITIES

FEDERAL CASES

Bond v. Dustin, 112 U.S. 604 (1884) 5

Campbell v. La., 523 U.S. 392 (1998) 4

Dorszynski v. United States, 418 U.S. 424 (1974) 6

Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931) 8

Grier v. United States, 419 U.S. 989 (1974) 6

Lawrence v. Chater, 516 U.S. 163 (1996) 6

Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) .....*passim*

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) .....*passim*

STATE CASES

Anderson v. West, 270 S.C. 184, 241 S.E.2d 551 (1978) 9

Webb v. CSX Transport., Inc., 364 S.C. 639, 615 S.E.2d 440 (2005) 7

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner CSX Transportation, Inc. ("CSXT") hereby submits the following reply addressing new matters raised by Respondent's opposition to CSXT's Petition for Writ of Certiorari. Each and every point urged in opposition to the granting of a writ misapprehends the law, the record, or both.

Respondent advances nine reasons why the writ of certiorari should not be granted, none of which directly address the overarching issue presented. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) ("*State Farm*"), this Court held that a jury may not base an award of punitive damages on dissimilar acts of a defendant without running afoul of the due process clause of the Fourteenth Amendment. Under this Court's recent decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) ("*Philip Morris*"), evidence considered for purposes of deciding punitive damages must be limited to evidence of conduct which caused the injury to the plaintiff. Evidence as to non-causative conduct or alleged harm to non-parties is not properly considered and an award that punishes a defendant for harm to non-parties is a deprivation of due process.

To that end, *Philip Morris* requires that states adopt and employ procedures to guard against jury confusion with regard to due process limitations on punitive damages. That was not done by the trial court, that was not done by the Supreme Court of South Carolina, and that cannot be done by a jury on remand under the mandate issued by the Supreme Court of South Carolina.

The trial court, among other errors not relevant here, refused CSXT's requests for procedural safeguards against due process violations when it: 1) denied CSXT's request for bifurcation of punitive damages; 2) admitted evidence of

out-of-state conduct and evidence of dissimilar accidents, crossings, and vegetation control programs; 3) failed to give CSXT's requested jury instructions that dissimilar acts may not serve as the basis for punitive damages and that conduct outside the state of South Carolina may not be considered, and; 4) refused CSXT's proposed special verdict form. (Petitioner's App. at 31a – 36a.)

On appeal, the Supreme Court of South Carolina perpetuated the trial court's deprivation of CSXT's due process rights when it affirmed liability, and then, without the benefit of a special verdict form, remanded for a trial solely on punitive damages. The Supreme Court of South Carolina's decision was based upon application of that state's "two issue rule," the principles of which are incompatible with the constitutional requirements applicable to punitive damage awards, making it impossible to provide the procedural safeguards required by *State Farm* and *Philip Morris* on remand.

I. CSXT DID NOT INVITE A RETRIAL LIMITED TO PUNITIVE DAMAGES WITHOUT THE PROCEDURAL SAFEGUARDS REQUIRED BY *STATE FARM* and *PHILIP MORRIS*. (Reply to Argument I.)

First, Respondent asserts that CSXT invited the Supreme Court of South Carolina to remand as to punitive damages alone, thereby guaranteeing a continuing violation of CSXT's due process rights. This contention is without merit.

As a threshold matter, CSXT made its position perfectly clear with regard to the lack of procedural safeguards, objecting to the refusal to bifurcate the proceedings, the admission of non-causal and other improper

evidence, the refusal to give the proper jury instructions on punitive damages, and the refusal to use CSXT's special verdict form and then seeking rehearing on the decision to remand solely as to punitive damages. As recited in detail in CSXT's Petition, the record is replete with CSXT's protestations that the failure to employ these procedural safeguards was in violation of CSXT's due process rights. (See CSXT's Petition for Writ of Certiorari at 3 – 10.) It cannot be said that CSXT requested the so-called "relief" it received from the Supreme Court of South Carolina in the form of a continued lack of requisite safeguards on remand.

II. WITH REGARD TO PUNITIVE DAMAGES, CSXT WAS TRIED IN AN UNCONSTITUTIONAL MANNER AND WILL BE RETRIED WITH A PROCEDURE THAT DOES NOT SATISFY *PHILIP MORRIS.* (Reply to Argument II.)

Respondent next argues that because the Supreme Court of South Carolina did not affirm the jury's award of punitive damages, CSXT has suffered no injury and lacks standing. This argument misapprehends the error assigned.

The multiple theories of liability asserted by Respondent in this case included negligence *per se*, negligent vegetation maintenance, operator incompetence, excessive speed, and operator's failure to sound the horn. Although CSXT maintains that permitting the jury to consider punitive damages was erroneous, the error assigned in this Petition is that the requisite procedural safeguards were wholly absent at the first trial, and that that situation was perpetuated by the Supreme Court of South Carolina. On remand there will be no available method to ensure that any award of punitive damages is based only upon causal evidence -- a state of affairs flatly prohibited in *Philip Morris*. The "injury" is not

the punitive damage award itself. Rather, CSXT is subject to retrial on punitive damages in a facially unconstitutional manner; an issue properly preserved below and ripe for adjudication by this Court.

CSXT need not wait to be assessed punitive damages on remand to have standing. The lack of procedures mandated by the Supreme Court of South Carolina in violation of CSXT's right to due process is a concrete injury to CSXT. "It is axiomatic that one has standing to litigate his or her own due process rights," *Campbell v. La.*, 523 U.S. 392, 400 (1998), and Respondent's argument to the contrary misses the mark.

III. REVIEW OF SOUTH CAROLINA'S FAILURE TO EMPLOY THE REQUISITE PROCEDURAL SAFEGUARDS IS AVAILABLE PRIOR TO ANY ACTUAL AWARD OF PUNITIVE DAMAGES ON REMAND. (Reply to Argument III.)

Similarly, Respondent asserts that the Supreme Court of South Carolina's decision is not reviewable because it is not a "final judgment" until punitive damages are awarded on remand. As discussed above, the error for which CSXT seeks redress is not the actual award of punitive damages itself. The Supreme Court of South Carolina rendered a final decision that mandates CSXT be tried on punitive damages in an unconstitutional way in contravention of *State Farm* and *Philip Morris*. That is the injury.

CSXT is not asking this court to "anticipate a question of constitutional law." (Resp. Br. at 9.) The Supreme Court of South Carolina created the federal issue presented in CSXT's Petition by remanding for a new trial solely on punitive damages without any way to limit the

jury's consideration of non-causative evidence, thereby perpetuating the trial court's denial of CSXT's due process rights. There is nothing forward looking or prospective about the question presented here.

IV. CSXT HAS PRESENTED AN ISSUE OF GENERAL IMPORTANCE AND ALSO AMPLE JUSTIFICATION FOR A GVR ORDER IN LIGHT OF *PHILIP MORRIS.* (Reply to Argument IV.)

Respondent alleges that because the Supreme Court of South Carolina's order is unpublished, CSXT's Petition does not present a question of "significant general importance." (Resp. Br. at 10.) However, CSXT has presented both an issue of general importance warranting the grant of *certiorari* and a case prime for this Court to grant a GVR Order in light of *Philip Morris.*

First, the question presented is whether, in the punitive damages context, application of South Carolina's "two issue rule," in a case containing multiple liability theories, without a special verdict form, can satisfy constitutional standards set forth in *State Farm* and *Philip Morris.* Although the "two issue rule" was upheld in this Court four generations ago in another context, *see Bond v. Dustin*, 112 U.S. 604, 609 (1884) ("whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration shall be sufficient to sustain the verdict"), it clearly violates *Philip Morris* in this context. It is a matter of general importance when a state has an unconstitutional punitive damages regime.

Furthermore, "[t]his case fits within the category of cases in which [this Court has] held it is proper to issue a GVR order." *Lawrence v. Chater*, 516 U.S. 163, 180 (1996) (*per curiam*). This Court regularly issues a GVR order where, as here, "an intervening event (ordinarily a post judgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court or a state court concerning a federal question." *Id.* (citations omitted). *See also, e.g., Grier v. United States*, 419 U.S. 989 (1974) (issuing GVR order vacating and remanding in light of this Court's intervening decision in *Dorszynski* v. *United States*, 418 U.S. 424 (1974)). Respondent's brief fails to address CSXT's request for a GVR order at all.

Philip Morris was decided on February 20, 2007, less than three weeks after the Supreme Court of South Carolina denied CSXT's petition for rehearing on January 31, 2007. Despite Respondent's protestations to the contrary, *Philip Morris* unequivocally holds that state courts cannot do what South Carolina has done here, namely, "authorize procedures that create an unreasonable and unnecessary risk" of jury confusion with regard to punitive damages. *Id.* On retrial, it is impossible to guard against this risk. For these reasons, this Court should issue a GVR order, and vacate and remand the decision of the Supreme Court of South Carolina in light of *Philip Morris*.

V. THE SUPREME COURT OF SOUTH CAROLINA'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT. (Reply to Argument V.)

Despite Respondent's protestations to the contrary, the decision by the Supreme Court of South Carolina mandating that CSXT be retried in this unconstitutional manner "decided an important federal question in a way that

conflicts with relevant decisions of this Court," thus the standard for granting *certiorari* pursuant to Sup. Court R. 10 (c) is met.

VI. THE RECORD CLEARLY DEMONSTRATES THAT THE TRIAL COURT ADMITTED EVIDENCE IN VIOLATION OF BOTH *STATE FARM* AND *PHILIP MORRIS.* (Reply to Argument VI.)

Respondent's contention that the trial court did not admit evidence in violation of *State Farm* and *Philip Morris* is simply contrary to the record. The jury was allowed to consider impermissible evidence of dissimilar and out-of-state conduct, evidence which was in some instances the identical evidence that was held to constitutionally mandate reversal under *State Farm* in *Webb v. CSX Transport., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005).

VII. SOUTH CAROLINA FAILED TO PROVIDE PROCEDURAL SAFEGUARDS REQUIRED BY THIS COURT'S JURISPRUDENCE. (Reply to Argument VII.)

Respondent illogically argues that because some (but not all) of the evidence of dissimilar, non-causal and out-of-state conduct was admitted with a limiting instruction, the trial court provided adequate due process safeguards. (Resp. Br. at 17.) First, only a portion of the evidence in question was subject to the limiting instruction that it was admitted solely to prove CSXT had notice of the "alleged need" of a vegetation control program. Second, this limiting instruction, which is the sole procedural safeguard identified by Respondent, cannot be deemed adequate to preserve CSXT's due process rights. The record at trial demonstrates a complete lack of procedural safeguards. Additionally, the

limiting instruction only addressed vegetation evidence, and not much of the evidence of the multiple other liability theories. Respondent's assertion that under these circumstances, the risk of due process violations can be cured by a simple notice instruction is unsupported and unsupportable.

VIII. IN THIS CONTEXT, CSXT CANNOT BE RETRIED ON PUNITIVE DAMAGES ALONE WITHIN THE PARAMETERS OF *STATE FARM* AND *PHILIP MORRIS.* (Reply to Argument VIII.)

Respondent argues that CSXT's due process rights will be protected on remand because on retrial the jury will be instructed that it "may only punish [CSXT] for the conduct which it determines killed Mr. Williams." (Resp. Br. at 20.) However, that result can only be reached through a new trial on both liability and punitive damages, which is the relief CSXT seeks. *See, e.g., Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (remanding for a new trial, holding the issue of damages "is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial"). The order of the Supreme Court of South Carolina does not permit the second jury on remand to determine which conduct caused the injury, nor could it without retrying the liability issues.

This is not a situation where CSXT is seeking to transform the use of a special verdict form, traditionally a matter of discretion for the trial court, into a "federally mandated due process issue." (Resp. Br. at 21.) Rather, CSXT submits that under the circumstances of this case, where multiple theories of liability were presented and there

is no way to know upon which theory the first jury found liability, a retrial on punitive damages alone cannot be had within the parameters set forth by this Court in *State Farm* and *Philip Morris*. Indeed, the first jury may well have based its verdict on the negligence *per se* charge the Supreme Court of South Carolina found to be error. By its decision, the Supreme Court of South Carolina thus improperly invites the second jury to impose punitive damages based on non-causative conduct.

IX. THE SOUTH CAROLINA SUPREME COURT CLEARLY APPLIED THE TWO ISSUE RULE. (Reply to Argument IX.)

Under South Carolina common law, "where a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed." *Anderson v. West*, 270 S.C. 184, 188, 241 S.E.2d 551, 553 (1978). The Supreme Court of South Carolina, on the face of its opinion, applied this so-called "two issue rule" when it upheld the jury's finding of liability, despite finding error with regard to the Respondent's negligence *per se* theory, "given the several other, more thoroughly developed theories of liability in the case . . ." as Justice Pleicones aptly noted in his dissent. (Petitioner's App. at 7a.)

Furthermore, Respondent tacitly admits elsewhere in her brief that "two issue rule" principles were applied. Respondent supposes that the jury found "excessive vegetation" caused the injury, but then in the same breath acknowledges liability might have been founded upon one of the "other acts of negligence." (Resp. Br. at 14.) Of course the Respondent cannot say for certain.

CONCLUSION

South Carolina's common law "two issue rule" that favors judicial efficiency over procedural due process cannot be constitutionally upheld in the punitive damages context. Punitive damages must be based on harm to the plaintiff, and not on harm to others or on account of dissimilar conduct or conduct in other states.

Therefore, your petitioner prays that the Court will grant its writ of certiorari and take jurisdiction of this case. In the alternative, your petitioner prays that the Court will summarily grant the writ, vacate the decision below, and remand for further review in light of this Court's decision in *Philip Morris*.

Respectfully Submitted,

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